

## U.S. Department of Justice

United States Attorney  
Southern District of New York

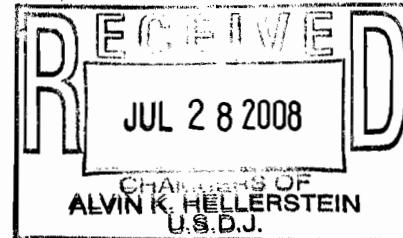
The Silvia J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

Def't may file an offer in  
by Aug. 5, 2008.  
7-29-08

BY HAND AND FACSIMILE

Honorable Alvin K. Hellerstein  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

July 28, 2008



Re: United States v. Santiago Marrero  
08 Cr. 657 (AKH)

Dear Judge Hellerstein:

The Government respectfully submits this letter in response to the Court's inquiry concerning whether the Government is permitted to turn over, for the purposes of discovery, a copy of the defendant's imaged hard drive which contains images of child pornography.

Specifically, at the July 28, 2008, pre-trial conference in this case, the Government stated that it would make a copy of the defendant's hard drive computer available at the office of the United States Postal Inspection Service for review by defense counsel within two to three weeks of the Pretrial Conference date. Your Honor ordered that the Government provide a legal basis for not turning over an imaged copy of the defendant's hard drive computer to defense counsel as part of discovery, pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

The Government proffers that approximately 400 images of child pornography, numerous internet files revealing the defendant's Internet browsing history, as well as a copy of the defendant's email mailbox, were recovered by the Government in forensic analyses of the defendant's hard drive.

The Government respectfully submits that, as the defendant's hard drive computer contains material that constitutes child pornography, it cannot be provided to defense counsel outside of

the Inspection Service or Government's offices. The Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act"), Public Law 109-248, codified at Title 18, United States Code, Section 3509(m), states as follows:

**Prohibition on Reproduction of Child Pornography-**

- (1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) must remain in the care, custody, and control of either the Government or the court.
- (2) (A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.  
  
(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

18 U.S.C. § 3509(m) (emphasis added); see also *U.S. v. Spivack* 528 F.Supp.2d 103, 106 (E.D.N.Y. 2007) (finding Section 3509(m)'s prohibition on reproduction constitutional so long as defense counsel is provided the "ample opportunity" to inspect, view, and examine material containing child pornography at a government facility) (citing cases).

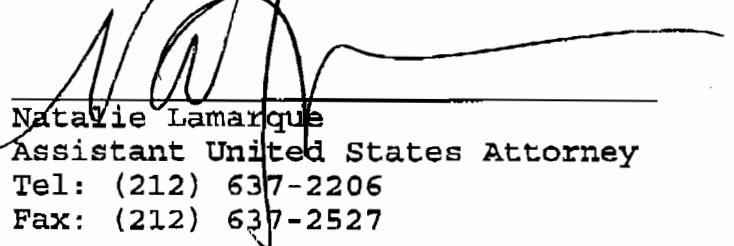
The Government, therefore, will confer with defense counsel to ensure that she is able to view these images at convenient times in advance of trial either at the United States Postal Inspection Service Office or the United States Attorney's Office. The Government respectfully submits that this renders the hard drive "reasonably available" thereby comporting with

both the Government's obligation under Rule 16, as well as the Adam Walsh Act.

Respectfully submitted,

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United States Attorney

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cc: Celia Cohen, Esq. (by facsimile)